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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FAUSTO ANTONIO SALAS,

Defendant and Appellant.

2d Crim. No. B169477
(Super. Ct. No. 2003017419)
(Ventura County)

Appellant Fausto Antonio Salas appeals from the judgment entered following his plea of guilty to assault with a firearm (count 1; Pen. Code, § 245, subd. (a)(2)).¹ He admitted the special allegations that he committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) and personally used a firearm during the commission of the crime (§ 12022.5, subd. (a)(1)). The following charges were dismissed: shooting at an occupied motor vehicle (count 2; § 246); street terrorism (count 3; § 186.22, subd. (a)); and accessory after the fact (count 4; § 32). Under the plea agreement, appellant was informed that he faced a maximum possible sentence of 24 years. The agreement did not contain a stipulated sentence.

¹ All further statutory references are to the Penal Code.

The trial court denied appellant's request for probation. It struck the gang enhancement, but ordered appellant to register as a gang member. (§ 186.30.) He was sentenced to an aggregate term of five years in state prison, consisting of the low term of two years for count 1, plus a consecutive three-year term for the firearm use allegation. (§ 12022.5) He faced a maximum 17-year sentence on count 1. Appellant contends that the trial court abused its discretion by sentencing him to prison, rather than granting him probation for three years, as recommended in the probation report. We affirm.

FACTS

Offense

The facts are based on the probation report, the statements in aggravation and mitigation. The victim was driving in Oxnard at approximately 10:00 p.m. He saw a car following him, driven by Luis Garcia, a Colonia Chiques gang member. Another gang member, David Ortiz, was in the back seat. Appellant was seated in the front passenger seat. Garcia pulled up alongside the victim's car and appellant leaned out the window and said, "Hey pussy, where are you from?" The victim answered, "What?" and appellant pointed a handgun at the victim and fired a shot at his car. A bullet penetrated the left door. The victim was uninjured.

The victim drove to a nearby school and spoke to several police officers standing outside. He told them someone had shot at his car and described appellant and the vehicle. The officers found the car in an Albertson's store parking lot and apprehended appellant and Ortiz inside the store. The store manager told the officers that he saw appellant and Ortiz throw something into a dumpster. Garcia was apprehended in a nearby parking lot.

At an in-field lineup the victim identified appellant as the shooter and Garcia as the driver. Officers recovered two firearms from the dumpster. They found a .9-mm handgun loaded with seven hollowpoint bullets and chambered with another bullet. The hammer was back and the safety was off. They also found a "six shot" revolver, with five live rounds and one spent cartridge.

After his arrest, appellant waived his Miranda rights and told officers he had not intended to shoot the victim. His gun went off when the victim made a "crazy turn" near Garcia's vehicle. Appellant denied being a Colonia gang member, but admitted that he "backs it up."

In a subsequent written statement, appellant stated he did not intend to shoot at the victim's car. The victim had been tailgating them. When the cars were alongside each other the victim said, "What's up lames, Sur Town," and made a motion as if he were going to pull out a gun. Appellant brandished his gun to scare the victim, who made a "crazy turn" and drove off. Garcia slammed on the brakes and the gun fired. Appellant was unaware that the bullet had struck the car and thought it had hit the ground. He did not know that Garcia was also in possession of a firearm. The three men went to Albertson's and threw both guns in a dumpster. Appellant stated that he had purchased the gun a week earlier for protection. He had recently been shot and stabbed and his car and home vandalized.

Probation Report

The probation officer indicated in her report that it was "alarming and inexcusable" that appellant fired a weapon when it appeared he was unprovoked. She found it difficult to believe that appellant did not consider himself a gang member or associate when he had purchased a gun for protection, had been shot and associated with known Colonia gang members. However, she also noted that this was appellant's first felony conviction and he does not have a significant prior record.

As circumstances in aggravation, the probation officer considered that the crime "involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" and that appellant's conduct represents a serious danger to society. (Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) As circumstances in mitigation she noted that appellant has an insignificant record and his prior performance on probation was satisfactory. (Cal. Rules of Court, rule 4.423(b)(1). Appellant had a strong showing of family and community support. His

family, teachers and community members had written numerous letters to the court attesting to his good character and volunteer service with youth. The probation officer suggested that a prison commitment was premature and could be imposed at a later date if appellant continued to associate with gang members and arm himself with weapons. She suggested that this was an unusual case in which probation could be granted and recommended a term of three years.

DISCUSSION

Sentencing Hearing

Appellant claims that the trial court abused its discretion because his sentence violates the principle of individualized sentencing. He argues that the court denied probation, not on the basis of his conduct alone, but to deter future criminal conduct by gang members. Appellant reasons that it is likely the court would have sentenced him to probation if the sentence had been based solely on his conduct.

At the sentencing hearing, the trial court stated that, although appellant had familial and community support, he was "entrenched in the gang lifestyle on the day of [the] offense." The court recounted that appellant's companions were known gang members and he had been the victim of both a shooting and a stabbing. Appellant had violated a court order not to associate with gang members and previously admitted gang membership to an officer of the Oxnard Police Department.

The trial court concluded, "The probation officer's recommendation is not necessarily unreasonable, but what bothers me is, if the Court grants Mr. Salas probation and he is an associate gang member, what does it tell the other gang-bangers in Oxnard, that it's okay to go around and fire into an occupied vehicle and you're not going to go to prison? And just because the person seated in the driver's car wasn't killed or severely injured by the gunshot, that's okay, you'll get probation?" The court added that appellant had demonstrated that it is not safe to have him on city streets.

Defense counsel argued that time in the county jail would serve the same purpose by keeping appellant off the street. The court responded, "Yeah. Well, when

people hear 'probation,' they never hear the year in the County jail. They just hear 'probation.' So I do not find this to be an unusual case in which probation may be granted. " The trial court imposed a sentence of five years in state prison.

Limitations on Probation

The court has broad discretion to grant or deny probation. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) We will reverse only if the trial court exercised its discretion in an arbitrary or capricious manner. (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.) A defendant who commits assault with a firearm is not eligible for probation, "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation" (§ 1203, subd. (e)(2).)² To make such a determination, the court must consider whether 1) the circumstances surrounding the offense are substantially less serious than those in similar cases; 2) the defendant has no recent record of committing a similar crime; and 3) the current offense is less serious than a prior felony conviction. (Cal. Rules of Court, rule 4.413(c)(1).) A defendant may be considered less culpable if he committed the crime under great provocation. (Cal. Rules of Court, rule 4.413(c)(2).)

If unusual circumstances are found to exist, the court must then consider specific factors in deciding whether to grant probation. (Cal. Rules of Court, rule 4.413(b).) These include the seriousness of the crime, whether the defendant was armed, whether he was an active or passive participant and "[w]hether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur." (Cal. Rules of Court, rule 4.414(a)(7).) The court must also consider whether the defendant has a prior record of criminal conduct, his prior conduct on probation, the

² "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . [¶] . . . (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." (§ 1203, subd. (e)(2).)

effect of imprisonment on the defendant and his dependents and "[t]he likelihood that if not imprisoned the defendant will be a danger to others." (Cal. Rules of Court, rule 4.414(b)(8).)

Appellant argues that there is no evidence in the record that the court considered any factors other than "the message probation would send to other gang members in the Oxnard area." We disagree. The record reflects that the trial court considered not only whether unusual circumstances existed (Cal. Rules of Court, rule 4.413), but also the criteria necessary to grant probation (Cal. Rules of Court, rule 4.414). The court articulated that appellant was the shooter, the crime was serious and that appellant continued to associate with gang members. It weighed a grant of probation against the potential consequences to the community if appellant was not incarcerated.

The trial court's ruling was not an abuse of discretion. Although appellant has no recent record of committing a similar crime, the instant offense was violent and unprovoked. There appear to be no factors that could reduce appellant's culpability and make this a case in which probation would be appropriate.

Appellant relies on *People v. Lock* (1981) 30 Cal.3d 454 to argue that "[b]asing a sentence solely on societal concerns violates individualized sentencing." In *Lock*, the defendant was a schoolteacher convicted of performing lewd acts upon three minors. At a hearing to determine if he was a mentally disordered sex offender (MDSO), two psychiatrists agreed that the defendant was amenable to outpatient treatment and recommended probation. The court found the defendant was an MDSO, yet it sentenced him to prison, rather than to a mental health facility. The court did not state the basis for its sentence. It remarked only that, as a schoolteacher, the defendant posed a risk to children, stating, "He's a teacher. That's what I base it on. . . . I think it's about time teachers quit doing these things to the kids in our schools." (*Id.* at p. 457.)

The Supreme Court reversed and remanded because the trial court had not stated on the record why it refused to commit appellant as an MDSO--especially since it appeared that the trial court may not have understood that an MDSO commitment would

have required the defendant's incarceration. (*People v. Lock, supra*, 30 Cal.3d at pp. 460-461.) Appellant relies heavily on a footnote in which the Supreme Court remarked, "One cannot help suspecting that the trial court violated the principle of individualized sentencing. [Citations.] Of course it was highly relevant that defendant was a school teacher and that his victims were particularly vulnerable. This does not mean, however, that it was proper to deny probation without even considering other relevant facts, as seems to have been the case." (*Id.* at p. 457, fn. 5.)

Appellant also cites *Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556 to demonstrate that a trial court may not base its sentencing decision exclusively on societal concerns. In *Martha C.*, a juvenile was arrested for smuggling marijuana. The court denied deferred entry of judgment (DEJ)³ stating that many juveniles are involved in drug-smuggling operations. "[I]n order to deter this kind of use of young people, and particularly this young woman, who's clearly talented and smart, from violating the law in this way, I feel that the social policy concerns mitigate against granting the DEJ." (*Id.* at p. 560.) The reviewing court concluded that the trial court's denial of DEJ was error because the basis for its decision was unrelated to Martha's potential for rehabilitation. (*Id.* at p. 562.) While a trial court may deny DEJ on the basis of an individual's prospects for rehabilitation, it may not do so "as a means of deterring criminal activity by others." (*Ibid.*)

Unlike *Lock* and *Martha C.*, the trial court's decision was not based exclusively upon a desire to deter criminal activity. Rather, the trial court stated on the record his consideration of appellant's personal history, the nature of his crime and the likelihood he would repeat the offense. It was upon this basis that it denied probation.

Appellant's active participation in a violent attack and the likelihood of its recurrence outweigh the letters submitted on his behalf and his lack of felony convictions.

³(Welf. & Inst. Code, § 790 et seq.; California Rules of Court, rule 1495.)

The trial court properly exercised its discretion in determining that this was not an unusual case in which probation could be granted.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Bruce A. Clark, Judge
Superior Court County of Ventura

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